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SUBJECT: OSCE Legal Personality, Round 6 Q Talks Make Progress As Russian Demand for a Charter Looms

Ref: A) USOSCE 331; B) State 69698 and previous

11. Summary: Meeting for the first time since July, on September 13-14 the Working Group on the Convention on Legal Personality, Legal Capacity and Privileges and Immunities for the OSCE (CLPPI) made considerable progress in removing bracketed text and reaching compromise on previously disputed issues. Almost all delegations, with reluctantly accepted addressing the very largely overlapping privileges and immunities (Ps and Is) of staff the notable exceptions of Sweden and the UK, at least of the Secretariat and Institutions and of Field Operations in separate articles (Articles 14 and 14 bis, respectively). There was also considerable discussion on what protection, if any, should be granted to members and staff of the OSCE Parliamentary Assembly (PA); a possible consensus text (Article i (j)) handles this through language linked to the definition of QPersons Performing Tasks for the OSCE.Q Russia again pressed for reference to a charter in the convention text, to which the Chair, the US, the UK and others objected, noting the impossibility of referring to the text of a document that does not exist. The Russian delegation has been relatively cooperative and the WG may well be able to finalize the substantive articles in October, although Russia has made utterly clear it will prevent final approval of a text until its demands on an OSCE Charter are met. On September 18, Russia and its CIS allies circulated a draft Ministerial decision to establish a working group to negotiate a charter. This sets the stage for the next big fight at the Madrid Ministerial. The next and almost certainly last CLPPI negotiating session will take place October 14-15. End summary.

Article 14 -- OSCE Officials

12. On Wednesday, before the WG convened, Belgium called a small group meeting to discuss its proposal (Ref A) to include a requirement for an Qinternal assessmentQ in the convention, which would in essence tax OSCE personnel, with the money going to the organization. The Belgian DCM said they had strict instructions from the Ministry of Finance to include some kind of assessment in the draft or else it would not be able to support. The UK agreed, since there was a perception that if there was no assessment, IO staff would be getting a free ride. The US, represented by L/EUR Peter Olson, noted that the USG, in contrast to many other countries, taxes its citizens that work for international organizations, and insisted that provision be made to avoid double taxation (i.e., national tax plus staff assessment). The Dutch and Germans sided with the US. Canada, which also taxes IO staff, noted that as currently drafted, the tax exemption would only exist if the staff assessment does. The US also noted that staff assessments are

normally adopted as internal management decisions rather than being provided for in treaty text.

¶3. At the beginning of the WG on Thursday, the Chair, Dutch Ambassador Ida Veldhuizen-Rothenbuecher, asked the Co-chair, Austrian MFA Legal representative, Dr. Helmut Tichy, to explain para 2 bis, concerning tax exemption as originally proposed by the Belgians (QOfficials shall be subject to a staff assessment for the benefit of the organization on the salariesQ paid to them by the organization. Such salariesQ shall be exempt from national income tax.Q) After brief discussion, the text was adopted, with language permitting States to disregard the exemption (i.e. tax) for their own citizens. There was no objection and brackets were lifted on the text.

-- Bracketed text providing general immunity from personal arrest or detention (para 1a) was deleted. The Chair noted in side conversation her understanding that Armenia, which was not present, no longer insisted on such language.

-- Azerbaijan, backed by Russia, continued to insist on deleting the exemption from national service (para 1f), despite the US observation that para 2 exempted States from granting that exemption to its own citizens. The text was bracketed.

-- On para 3, and consistent with its longstanding efforts to draw distinctions between headquarters and field operation personnel, Russia insisted on keeping the brackets on Qand Heads of MissionQ regarding the broader PQs and IQs given senior officials. Reflecting the views of many, Sweden rejected such differentiation between HOMQs and heads of institution.

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-- There was considerable discussion on exemption from immigration restrictions and alien registration (para 1g), focussing on whether express acknowledgment of visa requirements implied a right to deny visas in exceptional cases. Canada insisted states have no such right; the US, Germany and others insisted that they must and, under the existing language, do. The current text was retained, but there will be different understandings of its meaning.

¶4. After the UK (supported by Sweden) reiterated its continuing objection to treating headquarters (Secretariat and institutions) and field operation staff in separate articles, the Chair called for a tour de table at which UK repeated its position. Russia stated that if separate Articles 14 (Secretariat/ institutions staff) and 14 bis (field operations staff) were not accepted, Russia would revert to its earlier (and widely condemned) proposal that field operations staff be equated to experts on mission. Virtually all other delegations expressed strong preference for a single article with reluctant acceptance of separate articles so long as their substantive content remained acceptable. The US recalled and underscored the importance of the decision at the July session to retitle Article 14 "Members of Secretariat and Institutions" (vice "OSCE Officials") to avoid any invidious implication that QMembers of Field OperationsQ were not OSCE officials.

Article 4 -- Legal Capacity

¶5. Following the observation by the Netherlands and others that its inclusion would inappropriately and unhelpfully limit the OSCE's ability to conduct conferences, etc. outside the OSCE area, bracketed language Qin the territories of the States PartiesQ to limit the geographic scope was deleted.

Article 8 -- Tax Exemptions

16. Germany, under instructions from its Finance Ministry, proposed changes to the text on tax exemption from goods and services. It added language that any goods which the OSCE has acquired subject to exemption shall not be sold or disposed of except under conditions laid down by that State Party. The language is analogous to that found in the ICC Convention, it said. The Chair expressed her concern that it will be difficult to get a final decision from respective finance ministries and asked to leave the Article as it is. Germany said it would try to make the argument back in Berlin. The German rep came back on Friday morning with a proposal for a minor change, which the Chair recommended be accepted. Further discussion would take place in October.

Articles 18 Q Entry into force and 20 -- Amendment

17. The US requested a statement of Secretariat views on whether the draft CLPPI could be implemented, both legally and practically, if only some participating States were party to it Q i.e., a dual regime. Legal Adviser Sonya Brander stated that it could, and noted that even currently, the OSCE operates under two de facto regimes, as some States had taken legal action to implement legal personality and capacity and Ps and Is for the OSCE as recommended by the 1993 Rome Ministerial decision while others had not. At the Chair's request, the Dutch rep offered a brief discussion of precedents and possible approaches to the amendment provisions, suggesting an approach based broadly on the ICC ("Rome") Convention. The US noted that if, for example, only two-thirds was needed to adopt an amendment, this could lead to an even greater splintering of legal regimes, with some States adopting the convention, others not, and a few having adopted both the convention and whatever amendments were proposed.

Article 1(j) -- Persons Performing Tasks (OSCE PA)

18. The WG revisited the issue of whether members and staff of the OSCE Parliamentary Assembly (PA) should be given PQs and IQs and if so, under what circumstances. Discussion centered a proposal to cover PA personnel as a third category (with experts on mission and representatives of the CiO) of "persons performing tasks for the OSCE." Sweden preferred that the text remain as is, with no

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mention of the PA. PA Representative Andreas Nothelle said the PA recognized there were different categories of staff and they could be granted different levels of protection but that there should be something in the convention draft which covers them. Denmark, as host country for the PA, supported Nothelle's remarks and observed that the PA was an integral part of the OSCE. It should therefore not be included under Persons Performing Tasks but rather be given a separate article. Canada, by contrast, said the convention should grant OSCE parliamentarians PQs and IQs only when they are conducting official business, stressing that the PA was an autonomous body and acted as it wanted. Belgium recalled that earlier in the year, the WG had already considered and rejected a separate Article 16 solely dealing with the PA, and indicated a preference for having no reference to the PA. The current text was an attempted compromise. Nothelle said it was important that the reference to QOSCE meetingsQ in the draft should also include QOSCE PA meetingsQ and that the PA be mentioned specifically somewhere in Article 1.

19. This then led to a lengthy drafting session late Thursday night and then Friday morning. The new possible compromise draft specifies that QOther PersonsQ would refer to OSCE experts on mission and representatives of the OSCE Chairmanship, but addressed PA concerns about subordination

to the executive structures of the OSCE in two ways. First, PA members and staff would be treated in the same way as (rather than "being") persons performing tasks. Second, creatively ambiguous language was adopted extending Ps and Is to PA personnel taking part in the work of the OSCE "as identified by" the Cio Q a formulation leaving deliberately unclear whether the Cio decides when PA work is to be considered OSCE work, or rather simply accepts PA decisions in that regard. (As a practical matter, the Cio retains the authority to decide, but is likely to accept most if not all PA suggestions for when its work is "OSCE work.") Following the meeting, Nothelle reported that the PA president wished further changes, a request most concerned delegations were resistant to accommodating.

Article 15 bis -- Waiver of Immunities

¶10. There was some discussion as to how to waive immunity for PA members; it was proposed that the OSCE Secretary General, Qon requestQ from the PA, would waive immunity. With respect to waiving the immunity of the OSCE itself, Russia insisted that neither the SG nor the Cio had authority to do so, and wanted to seek Permanent Council approval in such matters beforehand. Canada noted that this could bog down the PC over relatively trivial financial matters such as a contract dispute over stationery or catering supplies; the Chair concurred. Dr. Tichy proposed QnotificationQ of the PC; Russia insisted on Qconsent of its decision-making bodies," while allowing that a silence procedure would be acceptable. It pointed out that the SG is not similar to the UNSG in that the position heads only the OSCE Secretariat. The Chair noted that referring such cases to the PC would also infringe on privacy protection of the individuals involved. The issue remains unresolved.

Article 5 -- OSCE Premises

¶11. The US said that proposed language in Article 5, regarding waiving immunity, was duplicative of similar language in Article 7 and could give rise to significant and unnecessary confusion, and suggested its removal. After some discussion, it was agreed to delete the language.

Article 14 bis -- Members of Field Operations

¶12. Russia wanted to delete the exemption from national service obligations, arguing that field operations are QtemporaryQ thus that its staff did not need the protections appropriate for permanent staff such as that of the Secretariat and institutions. The US rejected this argument, noting that national service generally turns on residency status and that staff of field operations are present on a form of residency visa and thus potentially subject to such obligations. Russia further argued that no OSCE participating State now subjects foreigners to military service, to which the US noted that laws can change and Canada observed that in some provinces local

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authorities retain authority to conscript residents in case of natural disasters such as fire or flood. When Russia refused to back down, the US insisted on bracketing the national service exemption in Article 14 (Secretariat and institutions staff) on grounds that any arguments against the provision for field operations staff were equally applicable for headquarters staff

Charter

¶13. Russia proposed that a footnote proposed by Russia and

Belarus be inserted into the body of Article 4 (Legal Capacity), so that it would read, QThe OSCE shall possess such legal capacity as is necessary for the exercise of its functions [as they are set forth in the OSCE Charter.]Q It also proposed two new paragraphs for the Preamble which would expressly reference the Charter. The Chair noted that the WG did not have a mandate to discuss a charter and that since the charter was non-existent, it would not be appropriate to submit the convention text to the CiO with such a reference. The US supported that position, as did Finland, the UK, Germany, and Denmark. The Netherlands said it could recall no precedent whatsoever where a reference was made to a document that did not exist. Spain agreed that discussing a charter would be beyond the WGQs mandate. Russia said the OSCE was often QexceptionalQ and that the draft currently referred to staff assessments, which currently did not exist. Russia also stated that it could "guarantee" that by the time the CLPPI was finally adopted a Charter would exist Q meaning that it would refuse to permit adoption of the CLPPI until a Charter had first been negotiated. The US made clear that it is unprepared to consider a Charter. It is likely that, even if all other text is agreed, the proposed references to the Charter in the Preamble and Article 4 will remain bracketed.

¶14. Shortly after the conclusion of this latest round, Russia, Armenia, Belarus and the Central Asian states save Turkmenistan circulated a Ministerial draft decision calling for the establishment of a working group in 2008 which would draft an OSCE charter to be submitted to the MC in December 2008. The draft decision included a draft charter which had been circulated in June (Ref B). The Russians and their allies will no doubt attempt to use the convention draft as leverage with participating States, especially those on the fence, to get them to agree to a charter WG.

Conclusion

¶15. Once again, considerable progress was made in finalizing the text, leaving a very real possibility that a complete text will be concluded by the end of the October session Q complete, that is, with the exception of brackets around the text proposed by Russia referring to the non-existent Charter.

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